SUPREME COURT, U. S.

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Supreme Court of the United States

October Term 1968

No. [redacted] 98

HARRY J. AMELL, *et al.*,
Petitioners,

against

THE UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Supreme Court of the United States

October Term 1967

No.

HARRY J. AMELL, *et al.*,

Petitioners,

against

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners * pray that a writ of certiorari be issued to review the judgment of the United States Court of Claims, entered in the above-entitled case on February 16, 1968.

---

* The names of all petitioners are as follows:

Harry J. Amell
Charles Banish
Edward A. Barnack
Nicholas Bdera
Frank W. Brett
Marion R. Brogdon
Loton M. Bryant
Frank H. Calhoun
Joseph R. Carman
Fred Cipresso
Jeremiah P. Collins
Joseph P. Constantineau
Robert E. Corder
Carlos De Jesus
George A. DeLong
Anthony Drages
Andrew J. Dunne
George E. DuPont
C. Forsyth
Frederick J. Fromm
Joseph Godlewski
C. Gordon Grant, Jr.
William A. Gross
Jacob M. Hand
John Hargrave
Charles Heller
Soren G. Henriksen
J. A. Kirven
Andor Kittilsen
Calvin M. Johnson
Max J. Lechich
Melvin F. Lesse
A. Liberato
James R. Loper
Donald K. McKee
John J. Markey
John H. Miller
Gaetano Minutillo
Paul J. Nelson
J. Nestor
Jason D. Oberon
Saturnin Onichimonski
Richard R. Peynelo
John A. Pregenzer
Ralph F. Randall
B. Rasmussen
Philip E. Reynolds
James C. Rowe
Daniel F. Santos.
Theodore Schoenberger
M. Simonsen
Haavard Skilnand
C. W. Skotnicki
Joseph B. Smith
Harold Sorenson
John M. Stanley
Ralph W. Stockman
Alexander Talkun
Charles E. Taylor
George Toth
Theodore F. Verhey
Homer M. Waterman
Harold W. Wheeler
Jerome W. Winterfield
John Wright
Modesto Zaar
Bruno H. Zahlmann

Citation to Opinion Below

The opinion of the court has not yet been reported and is printed in Appendix A hereto *infra*, p. 13.

Jurisdiction

The judgment of the Court of Claims was rendered on February 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

Question Presented

As a result of labor-management wage-review negotiations, the maritime industry granted an increase of 3½% of base wages to its maritime officers but left to the affected employees the choice as to how such payments should be applied. The employees voted that the amount of such increases be paid into the labor-management pension and welfare fund.

Whether under those circumstances, the Classification Act and the Federal Employees Pay Act which provide for compensation for maritime officers employed on vessels operated by the United States in accordance with prevailing wages and practices in the maritime industry, require that such officers in the United States service be granted an increase in wages equivalent to the payments made by the maritime industry as the result of a wage review.

Statutes Involved

The statutory provisions involved are the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. § 1082(8) [now 5 U.S.C. § 5102(c)(8) and § 5342(a), September 6, 1966 revision and codification]; the Federal Employees Pay Act of 1945, 59 Stat. 304, as amended, 5 U.S.C. § 946 [now 5 U.S.C. § 5342, September 6, 1966 revision and codification]. They are printed in Appendix B.

Regulation Involved

The regulation involved is the Department of the Navy's Civilian Marine Personnel Instructions (CMPI 531.1-3). It is printed in Appendix C.

Statement

Petitioners at all pertinent times were employed as licensed marine engineer officers aboard vessels of the Military Sea Transportation Service, Atlantic area, of the Department of the Navy, hereinafter "MSTS". Petitioners are all members of the National Marine Engineers Beneficial Association, District No. 1, AFL-CIO, (hereinafter "MEBA"). MEBA is recognized, pursuant to Executive Order 10988 and a collective bargaining agreement with MSTS, as the exclusive bargaining agent of the licensed marine engineers employed by MSTS.

The compensation of the petitioners is not established as a result of collective bargaining negotiations but pursuant to the Federal Employees Pay Act and the Classification Act.

The Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. § 1082(8) provides that petitioners' "compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry." The Federal Employees Pay Act of 1945, 59 Stat. 304, as amended, 5 U.S.C. § 946(1964) provides that petitioners "be compensated in accordance with the wage practices of the maritime industry."

The Classification Act provision was included in the collective bargaining agreement between MEBA and MSTS as part of Article XII (R. 22).[1] Similar provision for

[1] Numbered references preceded by "R" are to the consecutively numbered pages in the complete certified record from the Court of Claims.

the compensation of MSTS employees is made in the Department of the Navy's Civilian Marine Personnel Instructions also incorporated in Article XII.[2]

Provision is also made that the Secretary of the Navy will authorize new or revised pay rates and practices to become effective concurrently with corresponding changes in the industry whenever administratively possible.[3]

Until June 15, 1962 the pay rates of marine engineers employed on MSTS vessels and those employed on board private carriers were the same.

On June 16, 1962 the picture changed. The collective bargaining agreements between the MEBA and private carriers effective June 16, 1961 provided that the Union could request two Wage Reviews after June 15, 1962 and June 15, 1963:

> "Said Wage Reviews may include any matter of cost provided that the first review may not exceed a cost of three and one-half per cent (3½%) of base wages and the second review may not exceed a cost of three and one-half per cent (3½%) of base wages."[4]

The Wage Review of June 16, 1962 was the first time since the enactment of the Classification Act and the Federal Employees Pay Act that the employees represented by MEBA through collective bargaining were in a position to use a wage increase in any way they saw fit.

In applying the terms of the collective bargaining agreement, MEBA sent a questionnaire to the membership asking them to indicate which one of four major areas of benefits the membership desired to apply the moneys obtained in the wage review. The members decided to

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[2] R. 22, 23.
[3] R. 23.
[4] R. 138.

apply the entire increase resulting from the Wage Review of June 16, 1962 to pension and welfare benefits, and the private employers thereafter did so apply the increases. No such increase of 3½% of wages was applied to the compensation of MSTS engineers either by way of actual wages or an increase in other benefits.[5]

In December 1962 MEBA attempted to secure the benefit of the 1962 Wage Review for the MSTS engineers by way of a wage increase. On December 30, 1963 the Secretary of the Navy denied the claims for wage increases on the ground that the choice made by the membership in the 1962 Wage Review did not "represent wages paid to the members of your organization but rather are increments in pension and educational benefits."[6] This decision was subsequently affirmed by the United States General Accounting Office.

Thereafter the petitioners brought suit in the United States Court of Claims on November 12, 1962 alleging a violation of 5 U.S.C. § 1082(8) and seeking an accounting and damages of $100,000.[7]

The United States Court of Claims stated that:

> "Much of the difficulty presented by this case is occasioned by the use of the word 'compensation' in the comparability provision of the Classification Act of 1949, in the regulations, and in Article XII

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[5] In 1963 the 3½% increase pursuant to the Wage Review Clause, was voted by the membership to be applied by MEBA to wages and the MSTS granted the full wage increase accordingly.

[6] Appendix A, p. 19.

[7] The U. S. Court of Claims ordered the case transferred to the District Court for the Southern District of New York, believing it to be a case involving original admiralty jurisdiction. On review the Supreme Court held that the cause of action is one to recover civilian pay under the Tucker Act and that the Court of Claims was the proper forum. *Amell* v. *United States*, 384 U.S. 158 (1966).

of the negotiated contract. Since neither party has cited any decision of law which is dispositive of the question, we think congressional intent is to be determined by viewing the term 'compensation' in its broad statutory context and in connection with various benefits which Congress has provided for MSTS employees in other Laws." [8]

In so ruling the Court of Claims found that Congress did not intend the term "compensation" to include the employment costs in issue here.

Reasons for Granting Writ

1. This case presents an important question of federal law which has not been, but should be, settled by this court.

In narrowly construing the term "compensation" as found in the Classification Act, the Court of Claims has precluded petitioners who are employed aboard vessels operated by the MSTS from the opportunity to achieve comparability in prevailing rates and practices with members of MEBA working in the maritime industry as intended by Congress.

More significantly the determination of the Court of Claims in the instant case also affects thousands of other government employees subject to the same provision of the Classification Act.

Congress considered comparability of compensation under the Classification Act to be of such importance that the ascertainment of prevailing rates and practices was left outside the realm of collective bargaining so that necessary and appropriate adjustment in compensation

[8] Appendix A, p. 20.

could be made from time to time as required without the parties being bound by the terms of a collective agreement.

The decision in the instant case affects the public interest. As this Court stated in *United States* v. *Lowden*, 308 U.S. 225, 238 (1939), the public interest is promoted where there is "efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve."

The decision of the Court of Claims herein means that there has been an absolute loss, from the standpoint of comparability, of 3½% of the benefits gained by way of a wage review by the members of MEBA employed in the maritime industry.

This type of loss is the kind that the Court should consider for ultimate determination, because not only have individuals suffered an absolute loss but public employees in general as well as prospective governmental employees should know what they may expect in the form of overall "compensation" as compared to those performing similar work in the private maritime industry sector.

Only a final determination by this Court as to the meaning to be given to the term "compensation" as used in the Classification Act will provide governmental employees with the basis for knowing what compensation they would be entitled to should they enter government service in comparison with compensation in the maritime industry.

2. The decision of the Court of Claims appears to be in conflict with the principles expressed in *United States* v. *Carter*, 353 U.S. 210 (1956), *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875 (1st Cir. 1949); and *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949), aff'd on other grounds sub nom. *American Communications Ass'n.* v. *Douds*, 339 U.S. 382 (1950).

In the instant case the respondent could provide the increase demanded by petitioner by way of an increment in wages as authorized by the Wage Classification Act and the Federal Employees Pay Act.

The Court of Claims concedes in its opinion that the Classification Act "is essentially a scheme for determining the wages and salaries to be paid federal employees and uses the term 'compensation' throughout with reference to salaries and wages". (Appendix A, p. 21.)

This Court ruled in *United States* v. *Carter*, 353 U.S. 210, 217-18, that "unpaid contributions [to a pension and welfare fund] were part of the compensation for the work to be done by Carter's employees."

Although this was an action under the Miller Act, 49 Stat. 793, 40 U.S.C. § 270(a)-(d), against a surety of a defaulting contractor, this Court recognized as early as 1956 that "compensation" included contributions to pension and welfare funds in addition to wages.

In *W. W. Cross & Co.* v. *National Labor Relations Board, supra*, the Court of Appeals for the First Circuit was asked to determine whether a group insurance program is a matter related to "wages" as one of the subjects of collective bargaining expressed in § 9(a) of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C. § 159(a).

In finding that group insurance programs were a subject of collective bargaining as well as "wages" within the meaning of the National Labor Relations Act, the Court states:

> "[T]he word 'wages' . . . must have been intended to comprehend more than the amount of remuneration per unit of time worked or per unit of work produced . . . [I]t must have been meant to comprehend emoluments resulting from employment in addition to or supplementary to actual 'rates of pay.'"

> "... [T]he word wages ... embraces within its meaning direct and immediate economic benefits flowing from the employment relationship." (at p. 878).

It seems incredible that in creating an area of comparability in "compensation" and "prevailing rates and practices", Congress intended that comparability be limited to actual rates of wages. If all that Congress intended to be comparable was actual wage rates, there would have been no necessity for the inclusion of the terms "compensation" or "practices" in the Classification Act. A reasonable interpretation of comparable compensation as used in the Classification Act would lead to the conclusion that compensation includes wages and other economic benefits derived from employment relations.

The expanded view of what constitutes compensation is enhanced by the determination of the Court of Appeals for the Seventh Circuit in *Inland Steel Co.* v. *National Labor Relations Board, supra.* The court there held that pension and welfare plans were wages and as such a mandatory subject of collective bargaining, basing its conclusion on the determination of the National Labor Relations Board that

> "'wages' as used in Section 9(a) [of the National Labor Relations Act] must be construed to include emoluments of value, like pension and insurance benefits, which may accrue to employees out of their employment relationship * * * Realistically viewed, this type of wage enhancement or increase no less than any other becomes an integral part of the entire wage structure, and the character of the employee representatives' interest in it ... is no different than any other case where a change in the wage structure is effected." (at p. 251).

The reasoning of the Courts of Appeals for the First and Seventh Circuits that "wages" encompass pension and welfare benefits under the National Labor Relations Act, should be applicable in this case to accord with contempo-

rary labor relations practice. The petitioners herein seek an increase in wages as an increase in compensation comparable to the increase in pension and welfare benefits (another form of compensation) chosen by the MEBA membership and obtained as of June 16, 1962 by MEBA from the maritime industry as part of a wage review. In effect respondent is attempting to distinguish two sides of the same coin (compensation) to deny petitioners the increase in wages to which they are entitled.

3. The decision of the Court of Claims is erroneous. The court's decision was based on the view that the word "compensation" as used in the Classification Act, was not broad enough to encompass other benefits.

Even if the Court finds that pension and welfare benefits may not be considered a form of wages, consideration should be given to the fact that the benefit obtained by way of the wage review constituted a wage increase and that the MEBA membership in its sole discretion determined to apply such increase to the MEBA Pension and Welfare Plan. Thus it may be said that petitioners are seeking the same wage gain their fellow members obtained from private industry. The statutory right of the petitioners to compensation on a comparable basis to that of the maritime industry should not be based on the whims of the maritime industry employees in determining how their wage gains should be applied.

By failing to recognize that the wage increase demand of the petitioners was merely another form of increase in compensation comparable to the increase achieved by the June 16, 1962 wage review from the maritime industry, respondent has acted in an inimical fashion towards the public interest it was mandated to use as a guide in the fixing and adjusting of compensation of the petitioners pursuant to the Classification Act of 1949. The overall compensation of the petitioners is actually 3½% less than the compensation of similarly situated employees in the

maritime industry and this is necessarily *less* than the reasonable and just treatment of the petitioners as required in the public interest.

In denying petitioners' claim, the Secretary of the Navy contended that benefits in the maritime industry "not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry."[9] The respondent refuses to recognize that quite to the contrary overall compensation would, if the petitioners' demand were granted, then and only then be comparable.

While the MSTS could not equalize gains in compensation in the form of pension and welfare benefits obtained by way of the June 16, 1962 wage review in the collective agreement between MEBA and the maritime industry because of the provisions of the Civil Service Retirement Act, 5 U.S.C. § 2251 [now revised and codified as 5 U.S.C. § 8331], the respondent was authorized by the Classification Act of 1949 and the Federal Employees Pay Act, as well as the collective agreement and the Department of the Navy's Civilian Marine Personnel Instructions, to fix and adjust compensation "as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry." 63 Stat. 954, as amended 5 U.S.C. § 1082 (1964).

The consequence of the Court of Claims determination in the instant case is that there is now a fixed disparity in the overall compensation received by those in the employ of the MSTS as opposed to those employed in the maritime industry. This disparity could not reasonably have been intended by Congress when it provided for comparability in prevailing rates and practices in the Classification Act and in wage practices in the Federal Employees Pay Act.

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[9] Appendix A, p. 19.

Congress has recognized that there exists a severe shortage of licensed personnel needed to operate MSTS vessels.[10] A fixed disparity in compensation can only tend to encourage a further shortage of government personnel, inconsistent with the congressional intent to prevent such occurrence by its comparability standards in respect to compensation.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] R. 25.

APPENDIX A

(Opinion of the United States Court of Claims)

IN THE

UNITED STATES COURT OF CLAIMS

No. 387-64

(Decided February 16, 1968)

HARRY J. AMELL, ET AL.,

v.

THE UNITED STATES.

DAVID SCRIBNER, for plaintiffs. LEE PRESSMAN, attorney of record. JOAN STERN KIOK, of counsel.

THOMAS J. LYDON, with whom was *Assistant Attorney General* EDWIN L. WEISL, JR., for defendant.

Before:

COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, SKELTON and NICHOLS, *Judges*.

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

Plaintiffs are civilian marine engineers employed by the Military Sea Transport Service, Atlantic Area (MSTS), Department of the Navy. They brought this suit to recover additional wages claimed to be due as a result of allegedly

comparable pay increases which were granted to commercial marine engineers by commercial maritime carriers.[1] Since there is no dispute between the parties concerning the facts, the only issues to be resolved are legal questions raised by cross-motions for summary judgment.

I

Plaintiffs are all members of District No. 1, National Marine Engineers Beneficial Association (MEBA). MEBA is the collective bargaining agent for marine engineers and negotiates agreements with commercial maritime carriers. Pursuant to Executive Order 10988, an agreement was negotiated, whereby MSTS has at all time material to this case recognized MEBA as the exclusive representative of all civilian marine employees, including plaintiffs, serving in Engine Department officer positions in MSTS, Atlantic Area.

Plaintiffs are wage board employees. Their wages are not set through collective bargaining negotiations but are fixed by administrative action pursuant to the Federal Employees Pay Act of 1945, 59 Stat. 305, as amended, 5 U.S.C. § 946 (1964) and by the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. § 1082 (1964).

The Classification Act of 1949 provides in pertinent part:

> This chapter * * * shall not apply to—
>
> * * * * *

---

[1] This case was first brought in this court in 1964. We ordered it transferred to the District Court for the Southern District of New York, believing it to be a case involving original admiralty jurisdiction. On review, the Supreme Court held that the cause of action is one to recover civilian pay under the Tucker Act and that this court is the proper forum. *Amell* v. *United States*, 384 U.S. 158 (1966).

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

The Federal Employees Pay Act of 1945 provides in pertinent part:

> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States,[2] * * * may be compensated in accordance with the wage practices of the maritime industry.

Pursuant to the Classification Act of 1949, the Department of the Navy issued regulations entitled "Civilian Marine Personnel Instructions" (CMPI-721),* which in paragraph 1-3 thereof entitled "Policy on 'Prevailing Rates and Practices' ", read as follows:

> *a. Determination.*—Prevailing pay rates and practices in the maritime industry are ascertained by an analysis of:
>
> (1) administrative practices concerning marine personnel employed by commercial maritime carriers,
>
> (2) agreements and contracts between commercial carriers and maritime labor unions, and
>
> (3) current marine positions throughout the maritime industry.

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[2] The Department of the Navy took over operation of vessels formerly operated by the Transportation Corps of the Army under a Directive dated August 2, 1949, issued by the Secretary of Defense. See 14 F.R. 5203 (1949).

* The citation to ("CMPI-721") appears to be erroneous and apparently should be CMPI-531.1-3.

Appendix A

> Specific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government. However, the Navy Department follows prevailing rates and practices as closely as is consistent with the public interest.

In Article XII of the collective bargaining agreement negotiated between MSTS and MEBA, the foregoing instructions were copied verbatim. In addition, Article III of the negotiated agreement provided as follows:

> It is agreed and understood by the employer [MSTS, Atlantic Area Command] and the employee organization [MEBA] that this agreement is subject to the provisions of CMPI 721 and any other applicable existing or future laws or regulations of the Federal Government, including but not restricted to those rules and regulations issued by the Civil Service Commission, the Department of Defense, the Department of the Navy, and the Commander, Military Sea Transportation Service, which may be set forth in the Federal Personnel Manual, the Federal Code of Regulations, other provisions of the Civilian Marine Personnel Instructions, U. S. Navy Regulations, and General Orders of the Secretary of the Navy.

II

Prior to 1962, no dispute arose between plaintiffs and the Government with respect to the compensation due plaintiffs. When the wages of licensed marine engineers were increased as a result of collective bargaining between the representatives of the private shipping companies and MEBA, the Department of the Navy took such negotiated agreements into effect and paid plaintiffs precisely [illegible]

same rates of pay as were granted to marine engineers in the maritime industry.

Before June 15, 1962, the private shipping companies contributed specified sums to the MEBA Pension and Welfare Plans, but no contribution to the plans was made by the licensed maritime engineers in private industry. During the same period of time retirement or pension benefits for MSTS maritime personnel were provided for in the Civil Service Retirement Act, 5 U.S.C. § 2251 (1964). There is no indication in the record that in the period preceding June 15, 1962, MEBA ever requested the Department of the Navy to increase the wages of MSTS employees on account of any contributions made to the MEBA Pension and Welfare Plans by the private shipping companies.

III

The dispute that resulted in this action was occasioned by a collective bargaining agreement entered into between MEBA and the private carriers, which was effective June 16, 1961, and provided:

* * * * *

> The Union may request two Wage Reviews on 60 days prior written notice, provided however, that the first such review may not be held prior to June 15, 1962 and the second review may not be held prior to June 15, 1963.
>
> Said Wage Reviews may include any matter of cost provided that the first review may not exceed a cost of three and one-half per cent (3½% of base wages and the second review may not exceed a cost of three and one-half per cent (3½%) of base wages.

Under the terms of the agreement, the affected employees were given the right to determine whether the increased employer contributions were to be applied to base wages or deposited in the MEBA Pension and Welfare Plan. The members of the union voted to put the

entire increase resulting from the wage review of June 15, 1962, into pension and welfare benefits. Accordingly, on June 28, 1962, MEBA entered into an agreement with the shipping companies, effective retroactively to June 16, 1962, that the companies would increase their contributions to the MEBA Pension and Welfare Plan by the amount of $0.865 per day per licensed engineer; this contribution was equivalent to 3½ percent of the base wages paid to such employees. There was no increase in the base wages of employees of the commercial carriers, and the basic wages of MSTS employees remained unchanged.

Effective as of June 16, 1963, the private carriers and MEBA entered into another agreement, whereby the contributions of the employers to employment costs were increased by 3½ percent of the base wages of the employees. The implementing agreement between the parties provided that the entire amount of the contribution should be used to increase the basic monthly wages of certain licensed engineers and to pay additional compensation for non-watchstanding, for overtime, and for related services. Promptly thereafter on August 30, 1963, the Department of the Navy approved similar changes, retroactive to June 16, 1963, whereby the basic wage rates for MSTS licensed engineers, including plaintiffs, were increased to the same extent.

By letter of December 9, 1963, the President of MEBA wrote the Secretary of the Navy as follows:

* * * * *

> Our request is for a 3½% pay raise for MSTS engineers as of June 15, 1962 and now a further 3½% raise as of June 15, 1963.[3] Our contract called for such raises with a provision that these pay raises could be used at our discretion. Our membership voted to put them into Pension and Educational benefits. It is our contention that these were pay

[3] The claim for 1963 is not now in issue in this case.

raises by virtue of our contract and that MSTS is obligated to follow and give its engineers the same per centage raise.

The Secretary of the Navy denied the request by letter of December 30, 1963, which stated:

• • • • •

The matter of which you write has been the subject of close review by the Military Sea Transportation Service and the Department of the Navy. The Military Sea Transportation Service and the Department have consistently granted to civilian marine employees the same wage increases which have occurred in the maritime industry and which have been paid as such to seamen employed by commercial ship operators. It is the view of the Department that the increases of which you write do not represent wages paid to the members of your organization but rather are increments in pension and educational benefits. As you know, regular civilian marine employees of the Military Sea Transportation Service are covered by the Civil Service Retirement Act, and the employer pays sizable amounts into the retirement fund. Furthermore, the Congress, from time to time, appropriates substantial sums into this fund.

We have in the past conformed and shall continue in the future to conform with the letter and spirit of law controlling our Military Sea Transportation Service wage policy. However, it must be made clear that benefits negotiated in the commercial sector and not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry.

Appendix A

Plaintiffs brought this action following the adverse decision of the Secretary of the Navy. The only issue to be determined is whether the Secretary was required by law to increase the base wage rates of MSTS maritime personnel in an amount equivalent to the contributions made by the private shipping companies to the MEBA Pension and Welfare Plans, effective as of June 16, 1962. Plaintiffs admit that if the Secretary of the Navy had acceded to their demand, the base wage rates of MSTS maritime personnel, including plaintiffs, would have exceeded the base wage rates of industry maritime personnel. Plaintiffs also acknowledge that, since retirement and pension benefits for MSTS employees were provided by the Civil Service Retirement Act, the Navy is precluded from increasing pension benefits for such employees unless and until that act is amended. Nevertheless, plaintiffs contend that the law required the Secretary of the Navy to increase their base wages by 3½ percent, because the employees of the shipping companies received increased benefits to that extent through the contributions of their employers to the Pension and Welfare Plan of MEBA. For the reasons hereinafter stated, we disagree with this contention and hold that plaintiffs are not entitled to recover.

IV

Much of the difficulty presented by this case is occasioned by the use of the word "compensation" in the comparability provision of the Classification Act of 1949, in the regulations, and in Article XII of the negotiated contract. Since neither party has cited any decisional law which is dispositive of the question, we think the congressional intent is to be determined by viewing the term "compensation" in its broad statutory context and in connection with various benefits which Congress has provided

for MSTS employees in other laws. From such an analysis, it becomes apparent that Congress did not intend "compensation" to cover either the whole ambit of employment costs or those in issue here.

The Federal Employees Pay Act of 1945, upon which plaintiffs rely in part, states in the title thereof that it is "An act to improve salary and wage administration in the Federal Service; to provide pay for overtime and for night and holiday work; to amend the Classification Act of 1923, as amended; * * * *". The word "compensation" is used throughout the statute with reference to wages and salaries of Government employees, to pay for overtime and holiday work, to periodic within-grade salary advancements, and to other pay granted directly to Federal employees. There is nothing in the act which makes any distinction between "compensation" and wages and salaries.

Again, the Classification Act of 1949 was passed for the purpose of providing a plan for the classification of positions in the Federal Service and to establish rates of basic compensation. It is essentially a scheme for determining the wages and salaries to be paid Federal employees and uses the term "compensation" throughout with reference to salaries and wages.

Of even greater significance is the fact that throughout the period involved in this dispute, personnel employed by the private shipping companies received fringe benefits under collective bargaining agreements, whereas the MSTS employees received comparable, although not necessarily equivalent benefits, under various acts of Congress other than the Classification Act of 1949. Such other acts include the Civil Service Retirement Act, 70 Stat. 743, as amended, 55 U.S.C. § 2251 (1964) [now 5 U.S.C. § 8331]; Federal Employees Group Life Insurance Act of 1954, 68 Stat. 736, as amended, 5 U.S.C. § 2091 (1964) [now 5 U.S.C. § 8701]; Federal Employees Health Benefits Act of 1959, 73 Stat.

708, 5 U.S.C. § 3001 (1964) [now 5 U.S.C. § 8901]; Annual and Sick Leave Act of 1951, 65 Stat. at 679, as amended, 5 U.S.C. § 2061 (1964) [now 5 U.S.C. § 6301], as further amended by the Act of November 2, 1966, 80 Stat. 1179; Compensation for Injuries to Employees of United States, 39 Stat. 742, as amended, 5 U.S.C. § 751 (1964) [now 5 U.S.C. § 8101]. No regulatory or contractual attempt was made to tie in the benefits received by MSTS employees under such statutes with those granted to the employees of the private shipping companies for the simple reason that none of the cited acts excludes MSTS employees from its coverage and none contains a comparability provision like that in the Classification Act of 1949.

Our holding is buttressed by the fact that in 1966, the attention of Congress was directed to the fact that MSTS was encountering difficulty in recruiting civilian employees because of the more liberal leave policy of the private shippers. Thereupon, Congress passed a statute to provide additional "home leave" for MSTS employees, the Act of November 2, 1966, 80 Stat. 1179, amending 5 U.S.C. § 6305. Since an act of Congress was required to effectuate the change, it seems clear that any attempt to equalize the home leave of MSTS employees through changes in the regulations or in the negotiated contract would have violated the statute as it stood prior to the amendment.

Thus, the inference to be drawn from the fact that benefits for MSTS employees are provided in various statutes, totally distinct from the Classification Act of 1949, is that the word "compensation", as used in that statute, is not broad enough to encompass benefits provided in other laws.

Appendix A

V

Defendant argues that the applicable law vested discretion in the Secretary to grant or to deny the wage increase requested by MEBA. In reliance on the statutory phrase "consistent with the public interest," defendant asserts that the Classification Act of 1949 "clothes the Secretary with a mantle of discretion." Plaintiffs reply that the increase was mandatory under the law and that the Secretary had only the limited discretion to make sure that the increased rates would be consistent with the public interest; they cite *Pacific Power & Light Co.* v. *Federal Power Comm'n*, 111 F. 2d 1014 (9th Cir. 1940). It is not clear from the Secretary's decision whether he felt required by law to reject plaintiffs' claim or whether he denied it within the limits of his discretion. Although he did not decide expressly that the approval of plaintiffs' request would be inconsistent with the public interest, he stated that the increased contributions paid by the private shipping companies represented increments in pension and educational benefits rather than wages, and called attention to the fact that MSTS employees were covered by the Civil Service Retirement Act. Moreover, in rejecting the claim, he declared that a contrary position would lead the Navy into the untenable position of providing compensation for MSTS employees which would exceed that received by employees of the private carriers.

There is considerable doubt whether the Secretary had any discretion to grant the wage increases involved in this dispute. However, if we assume without deciding that some degree of discretion resided in the Secretary, we hold that he did not abuse that discretion in his decision. *Crawford* v. *United States*, 179 Ct. Cl. 128, 376 F. 2d 266 (1967), *cert. denied*, January 15, 1968, 389 U.S. —.

VI

Finally, plaintiffs argue that the concept that prevailing wages include fringe benefits has become widely recognized in recent years. In particular, they call attention to an amendment to the Davis-Bacon Act, 46 Stat. 1494, 40 U.S.C. § 276a (1964), which included fringe benefits in the definition of prevailing wages for laborers and employees of contractors on public works. Although this argument is somewhat appealing, it collides with the fact that specific provisions in applicable statutes are required to bring "prevailing wages" within the concept of "fringe benefits," and that no such amendments have been made to the statutes affecting plaintiffs. As the Supreme Court said in a comparable situation, "If civilian seamen employed by the Government are to be accorded rights different from or greater than those they enjoy under the Compensation Act, it is for Congress to provide them." *Patterson* v. *United States*, 359 U.S. 495, 496-7 (1959).

Plaintiffs' motion for summary judgment is denied; defendant's cross-motion for summary judgment is granted, and plaintiffs' petition is dismissed.

APPENDIX B

(Statutes Involved)

Classification Act of 1949, 63 Stat. 954, as Amended, 5 U.S.C. § 1082 (1964)

Section 1082(8) provides in pertinent part:

This chapter * * * shall not apply to—

* * * * * *

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

Federal Employees Pay Act, 59 Stat. 304, as Amended, 5 U.S.C. § 946

§ 946. Vessel Employees

Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior, and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry.

APPENDIX C

(Regulation Involved)

Civilian Marine Personnel Instructions (CMP1 531.1-3), provides:

1-3. POLICY ON "PREVAILING RATES AND PRACTICES."

a. Determination.—Prevailing pay rates and practices in the maritime industry are ascertained by analysis of:

(1) administrative practices concerning marine personnel employed by commercial maritime carriers,

(2) agreements and contracts between commercial carriers and maritime labor unions, and

(3) current marine positions throughout the maritime industry.

Specific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government. However, the Navy Department follows prevailing rates and practices as closely as is consistent with the public interest.

b. Application of benefits.—Where fringe benefits exist in the maritime industry, a determination of their application to MSTS positions has been made on:

(1) whether the benefits are general in the industry,

(2) whether their incorporation is in the public interest,

(3) whether exclusion of a particular benefit is sufficiently compensated for by application of priv-

ileges and benefits accorded civil service employees not matched in the industry, and

(4) whether the benefits are fair and reasonable.

c. Authorization.—Marine pay rates and practices as finally derived in accordance with *a* and *b* above are applied, consistent with the public interest, upon establishment of the fact that they are prevailing rates and practices. The Secretary of the Navy will authorize new or revised pay rates and practices to become effective concurrently with corresponding changes in the industry whenever administratively possible. No application of industry pay rates and practices shall be made prior to specific authorization by the Secretary of the Navy.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1434

HARRY J. AMELL, ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. A, pp. 13–24) is reported at 390 F. 2d 880.

JURISDICTION

The judgment of the Court of Claims was entered on February 16, 1968. The petition for a writ of certiorari was filed on May 14, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, under the Classification Act of 1949, which provides that the "compensation" for maritime officers employed on vessels operated by the United States shall be fixed and adjusted "from time to time as

nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry," and under the Federal Employees Pay Act of 1945, which provides that such employees "may be compensated in accordance with the wage practices of the maritime industry," the United States is required to grant its maritime officers an increase in base wages equivalent to an increase in contributions made by the maritime industry to the pension and welfare plan for its employees.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Classification Act of 1949, 5 U.S.C. 1082(8) (1964 ed.) (now 5 U.S.C. 5102(c)(8) and 5342(a) (1966 rev.)) and the Federal Employees Pay Act of 1945, 5 U.S.C. 946 (1964 ed.) (now merged into 5 U.S.C. 5342(a) and (b) (1966 rev.)), as well as the relevant regulations of the Department of the Navy, are set forth in the Appendix, *infra*, pp. 15–16.

STATEMENT

Petitioners are 67 licensed marine engineer officers employed aboard vessels operated by the Military Sea Transportation Service (MSTS) of the Department of the Navy. They brought suit in the Court of Claims seeking sums allegedly due them under the provisions of the Federal Employees Pay Act of 1945 and the Classification Act of 1949.

Petitioners' compensation is governed by the Classification Act, *infra*, p. 15, which provides that the

"compensation" of officers and members of crews of vessels

> * * * shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

Additionally, the Federal Employees Pay Act of 1945, *infra*, p. 15, provides that:

> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, * * * may be compensated in accordance with the wage practices of the maritime industry.[1]

According to the implementing regulations of the Department of the Navy for determining prevailing rates and practices, "[s]pecific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government."[2] Where fringe benefits exist in private industry, various factors are to be taken into account in determining their applicability to MSTS employees, *e.g.*, whether exclusion of a particular benefit from the MSTS employees "is sufficiently compensated for by application of privileges and benefits accorded civil service employees not matched in the industry." The collective bargaining

---

[1] The Department of the Navy took over operation of vessels formerly operated by the Transportation Corps of the Army under a directive dated August 2, 1949, issued by the Secretary of Defense. See 14 F.R. 5203.

[2] See Civilian Marine Personnel Instructions (CMPI) 531.1–3 set forth in full, *infra*, pp. 15–16.

agreement negotiated[3] between the government and the union to which the petitioners belong—the National Marine Engineers Beneficial Association (MEBA)—was expressly made subject to these provisions (R. 163, 22).[4]

Prior to 1962, whenever the private shipping companies, pursuant to collective bargaining agreements with MEBA, increased the base wages of their licensed marine engineers, the Department of the Navy increased petitioners' base wages in exactly the same amount. During this time, the private shipping companies also contributed specified sums to the MEBA Pension and Welfare Plan.[5] The Department of the Navy, however, at no time took these contributions into account in determining the base wages of MSTS employees (R. 16, 139, 140, 148). Rather, the MSTS employees received their pension benefits under the Civil Service Retirement Act, 5 U.S.C. 2251 (1964 ed.).[6]

In accordance with a 1961 collective bargaining agreement between the private shipping companies and MEBA (R. 138), the union was authorized to request "wage reviews" on June 15, 1962, and on June 15, 1963, not to exceed an adjustment of more than 3½% of "base wages" at either time. The employees had the right to decide whether resulting increases in benefits would be applied to base wages or be deposited in the MEBA Pension and Welfare Plan.

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[3] Pursuant to Exec. Ord. No. 10988, 27 F.R. 551.

[4] "R" refers to the record in the Court of Claims.

[5] The licensed maritime engineers in private industry made no contribution themselves to their Plan.

[6] Now 5 U.S.C. 8331 (1966 rev.).

After the June 1962 wage review, the employees voted to have the entire 3½% increase put into the Pension and Welfare Plan. Accordingly, the agreement between MEBA and the companies, effective June 16, 1962, provided that the companies would increase their contributions to the Pension and Welfare Plan by $0.865 per day per licensed engineer—a contribution equivalent to 3½% of their base wages; there was no increase in the wages paid to the employees.

The Department of the Navy made no changes in the base wages of the petitioners as a result of this agreement in the private sector of the industry.[7]

MEBA, as representative of petitioners and other MSTS licensed engineers, protested to the Secretary of the Navy the failure to increase the base wages of the MSTS employees as a result of the 1962 pension fund increases by the private companies. This request was denied by the Secretary of the Navy, in a letter to MEBA which stated (R. 24(A)):

> * * * It is the view of the Department that the increases of which you write do not represent wages paid to the members of your organization but rather are increments in pension

[7] In the second wage review between MEBA and the private companies, the agreement, effective June 16, 1963, provided that the entire amount of the increase in the employers' contribution—equivalent to 3½ percent of base wage—would be used to increase the basic monthly wages of certain employees, and to pay additional compensation for non-watchstanding, overtime, and related services. Consequently, the Department of the Navy approved similar changes in the base wages of its employees, effective as of June 16, 1963. These changes are not at issue here.

> and educational benefits. As you know, regular civilian marine employees of the Military Sea Transportation Service are covered by the Civil Service Retirement Act, and the employer pays sizable amounts into the retirement fund. Furthermore, the Congress, from time to time, appropriates substantial sums into this fund.
>
> We have in the past conformed and shall continue in the future to conform with the letter and spirit of law controlling our Military Sea Transportation Service wage policy. However, it must be made clear that benefits negotiated in the commercial sector and not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry.

The General Accounting Office subsequently approved the Secretary's decision.

Following the Secretary's determination, petitioners brought this action in the Court of Claims,[5] alleging violations of the Classification Act of 1949 and the Federal Employees Pay Act of 1945 and seeking an accounting and damages of $100,000. The court found

[5] The case was first brought in the Court of Claims in 1964. The Court of Claims, believing the case to be within the original admiralty jurisdiction, ordered it transferred to the United States District Court for the Southern District of New York. On certiorari, however, this Court held (*Amell* v. *United States*, 384 U.S. 158) that the cause of action is one to recover civilian pay under the Tucker Act, 28 U.S.C. 1346, 1491, and that the proper forum was the Court of Claims. Consequently, the case was remanded to the Court of Claims for a decision on the merits, and it is that decision, rendered February 16, 1968, which is now at issue here.

that Congress used the word "compensation" in the Classification Act so as not "to cover either the whole ambit of employment costs or those in issue here". Rather, the term "compensation", as used in the Classification Act and the Federal Employees Pay Act, means only the subject matter of those acts—wages and salary—and not fringe benefits, which are provided to federal employees under separate legislation. Accordingly, the instant claims were denied. As an additional ground for upholding the Secretary, the court ruled that assuming, without deciding, that the Secretary of the Navy had some degree of discretion under the statutes to allow the wage increases, he did not abuse that discretion in denying the wage increases to the MSTS employees.

ARGUMENT

1. The Court of Claims' analysis of the congressional understanding of the term "compensation" in the pertinent acts is clearly sound. See Pet. App. A, pp. 20–22. The relationship between the Classification Act and the Federal Employees Pay Act, on the one hand, and the various "fringe benefit" statutes, on the other, makes it plain that in the acts petitioners rely on Congress was concerned about establishing an approximate parity in basic "wages" when it spoke of "compensation" for the government's marine employees. Surely, the Classification Act was not intended to give the Secretary of the Navy power to increase employees' *benefits* under the Civil Service Retirement Act and other such acts. Yet, if the word "compensation" in the Classification Act were inter-

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preted as including pension benefits, that would be the grant of power contained in the Classification Act.

Petitioners' contention that this construction of the acts conflicts with the decisions in *United States* v. *Carter*, 353 U.S. 210, *W. W. Cross & Co.* v. *National Labor Relations Board*, 174 F. 2d 875 (C.A. 1), and *Inland Steel Co.* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960, affirmed on other grounds *sub nom. American Communications Ass'n* v. *Douds*, 339 U.S. 382, is erroneous. In those cases, it was held, in the context of other statutory plans, that the words "compensation" or "wages" included contributions to pension and welfare funds and similar benefits in addition to base wages. None of these holdings involved an interpretation of the Classification Act of 1949 and the Federal Employees Pay Act of 1945, which must of course be construed in their special framework of providing only a portion of the total benefits received by federal employees. Compare *United States* v. *Embassy Restaurant*, 359 U.S. 29, where, in the context of the Bankruptcy Act, the word "wages" was held not to include contributions by an employer to a union welfare fund. See, also, *Joint Industry Board* v. *United States*, No. 616, this Term, decided May 20, 1968.

2. In addition, in our view the Secretary of the Navy—regardless of what content is given the term "compensation"—possesses a measure of discretion as to increases in compensation; that discretion, as the court below alternatively held (Pet. App. A, p. 23), was not abused in this case. Under the Classification Act of 1949 the Secretary of the Navy is to fix and adjust petitioners' "compensation * * * from time to

time *as nearly as is consistent with the public interest* in accordance with prevailing rates and practices in the maritime industry"; and under the Federal Employees Pay Act, petitioners *"may be* compensated in accordance with the wage practices of the maritime industry" (emphasis added). Whatever "compensation" may cover, this language strongly suggests that the Secretary has some discretion in fixing and adjusting petitioners' wages.

The reason for avoiding an inflexible requirement of automatic equivalence between the private and governmental sectors results from the exceeding complexity of the problem of comparability. Indeed, exact comparability in total remuneration between petitioners and their counterparts in private industry is, from a practical standpoint, virtually impossible. For example, the Classification Act of 1949 and the Federal Employees Pay Act of 1945 are only two of many statutes affecting the total amount of financial benefits petitioners receive. As this Court observed on the prior review, *Amell* v. *United States,* 384 U.S. 158, 160, they also are covered by statutes such as the Civil Service Retirement Act,[9] the Federal Employees' Group Life Insurance Act,[10] the Federal Employees Health Benefits Act,[11] and the Annual and Sick Leave Act.[12] Employees in private industry generally receive, in greater or lesser degree, similar benefits under their

[9] 5 U.S.C. 2251 (1964 ed.) (now 5 U.S.C. 8331 (1966 rev.)).
[10] 5 U.S.C. 2091 (1964 ed.) (now 5 U.S.C. 8701 (1966 rev.)).
[11] 5 U.S.C. 3001 (1964 ed.) (now 5 U.S.C. 8901).
[12] 5 U.S.C. 2061 (now 5 U.S.C. 6301 (1966 rev.)). See also *e.g.*, the Federal Employees' Compensation Act, 5 U.S.C. 751 (1964 ed.), now 5 U.S.C. 8101 (1966 rev.).

collective bargaining agreements. However, each time an increase in such benefits in private industry takes place under the collective bargaining agreement, the Navy obviously cannot reflexively follow suit and increase the analagous non-wage benefits for its employees—only Congress, by amending the above statutes, can increase these benefits. On the other hand, if because of its inability to pursue that course, the Navy instead increased base wages to reflect each increase in non-wage benefits in private industry, then by parity of reasoning, the maintenance of such mirror-exactness in overall benefits would compel the Secretary to *reduce* the wages of Navy employees whenever Congress by statute increased non-wage benefits. If such reductions were not made, the total remuneration of federal employees, counting all benefits, would be higher than that of their private-industry counterparts. This undeniable and unintended consequence demonstrates the fallacy in petitioners' reading of congressional handling of this field.

It was, no doubt, to avoid the anomaly that the wages of federal maritime employees would be constantly fluctuating in two directions—up and down—that the Classification Act of 1949 and the Federal Employees Pay Act of 1945 are couched in language affording room for discretion. As this Court observed in *Amell* v. *United States, supra,* 384 U.S. at 162: "The wage scale of government-employed seamen is fixed by federal agencies; *it is not automatically adjusted to the rate of pay prevalent in private industry* * * *" (emphasis added).

The Secretary clearly acted reasonably in this case. He took the view that the 1962 increases in the pension benefits of the maritime officers in private industry

> do not represent wages paid to the members of your organization but rather are increments in pension and educational benefits. As you know, regular civilian marine employees of the Military Sea Transportation Service are covered by the Civil Service Retirement Act, and the employer pays sizable amounts into the retirement fund. Furthermore, the Congress from time to time, appropriates substantial sums into this fund.
>
> * * * * *
>
> [I]t must be made clear that benefits negotiated in the commercial sector and not paid as wages cannot be accepted for comparability pay adjustment by the Department. A contrary view would lead the Navy into the untenable position of effecting compensation exceeding, in fact, that of the maritime industry. [R. 24(A).]

This ruling, in accordance with established past policy, merely effectuates the judgment that exact comparability in total remuneration is an unworkable and unintended objective in establishing wage rates. Consequently, the line must be drawn somewhere between those increases in total benefits in private industry which will prompt increases in wages of similar federal employees, and those increases by private industry which will not. The Secretary has drawn the line between base wage increases on the one hand, and pension benefits on the other. Whether or not Con-

gress has *compelled* that the line be drawn at this point (see Point 1, *supra*, pp. 7–8), this distinction is plainly a reasonable one, for, as the Secretary pointed out, these federal employees receive benefits under the Civil Service Retirement Act analogous to the pension benefits in private industry.

Petitioners place emphasis (Pet. p. 10) on the fact that the increase in the pension benefits paid by private industry was made only after "the MEBA membership in its sole discretion determined to apply such increase to the MEBA Pension and Welfare Plan."[13] We fail to see how this makes the Secretary's determination unreasonable. Almost any time a collective bargaining agreement between union and management results in payments into the pension plan from the employer, the payments can be described as a decision by the union membership "in its sole discretion" to receive increased pension benefits instead of increased wages. The line relating wages and pension benefits must be drawn somewhere, and the Secretary did not act unreasonably in drawing it where he did. The Secretary's action in distinguishing the actual results in these alternative situations was reasonable, and was correctly respected by the Court of Claims. See *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153–154; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Crawford* v. *United States*, 376 F. 2d 266, 179 Ct. Cl. 128, certiorari denied, 389 U.S. 1041.

[13] There is no allegation that the benefits were actually paid out to the union members in the form of wages—subject to income taxation—and that the union members then paid them back into the pension plan. See 26 U.S.C. 3401.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Attorneys.

JUNE 1968.

APPENDIX

The relevant provision of the Classification Act of 1949, 5 U.S.C. 1082 (1964 ed.) is as follows:

> Section 1082(8):
> This chapter * * * shall not apply to—
>
> * * * * *
>
> (8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry.

The relevant provision of the Federal Employees Pay Act of 1945, 5 U.S.C. 946 (1964 ed.) is as follows:

> § 946. Vessel employees
> Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry.

The relevant provision of the Civilian Marine Personnel Instructions (CMPI 531.1–3), are as follows:

> 1–3 Policy On "Prevailing Rates and Practices."
> a. Determination.—Prevailing pay rates and practices in the maritime industry are ascertained by analysis of:
> (1) administrative practices concerning marine personnel employed by commercial maritime carriers,

(2) agreements and contracts between commercial carriers and maritime labor unions, and

(3) current marine positions throughout the maritime industry.

Specific industry rates and practices *per se* are not always directly transferable to MSTS marine positions because of variations among pay rates and practices in the maritime industry itself, and differing pay practices between industry and the government. However, the Navy Department follows prevailing rates and practices as closely as is consistent with the public interest.

b. Application of benefits.—Where fringe benefits exist in the maritime industry, a determination of their application to MSTS positions has been made on:

(1) whether the benefits are general in the industry,

(2) whether their incorporation is in the public interest,

(3) whether exclusion of a particular benefit is sufficiently compensated for by application of privileges and benefits accorded civil service employees not matched in the industry, and

(4) whether the benefits are fair and reasonable.

c. Authorization.—Marine pay rates and practices as finally derived in accordance with a and b above are applied, consistent with the public interest, upon establishment of the fact that they are prevailing rates and practices. The Secretary of the Navy will authorize new or revised pay rates and practices to become effective concurrently with corresponding changes in the industry whenever administratively possible. No application of industry pay rates and practices shall be made prior to specific authorization by the Secretary of the Navy.

U.S. GOVERNMENT PRINTING OFFICE: 1968